

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

In Re:)	
)	
AREDIA and ZOMETA PRODUCTS)	No. 3:06-MDL-01760
LIABILITY LITIGATION)	Judge Campbell/Brown
(MDL No. 1760))	
)	
This Document Relates to)	
3:07-CV-1017 (Pennypacker))	

TO: THE HONORABLE TODD J. CAMPBELL

REPORT AND RECOMMENDATION

For the reasons stated below the Magistrate Judge recommends that the Defendant's motion to dismiss for failure to substitute a plaintiff in accordance with Federal Rule of Civil Procedure 25(a)(1) be **GRANTED** (Docket Entry 3955).

DISCUSSION

As the Defendant's memorandum in support of their motion (Docket Entry 3956) points out, a suggestion of death was filed on June 30, 2008 (Docket Entry 1412) and no motion for extension of time has been filed and, as of the date of their motion, no substitution of Plaintiff has been filed with the court.

In their response to this motion, Plaintiff's counsel in Docket Entry 4026, admitted that they had been unable to secure any response from the deceased Mrs. Pennypacker's next of kin. Under the circumstances they advised they do not oppose the motion to dismiss as long as it is without prejudice. Novartis did not request that the dismissal be with prejudice and, accordingly, the

Magistrate Judge recommends that the motion to dismiss Mrs. Pennypacker's case be **GRANTED** with prejudice.¹

RECOMMENDATION

For the reasons stated above, the Magistrate Judge recommends that this case be **DISMISSED** without prejudice.

Under Rule 72(b) of the Federal Rules of Civil Procedure, any party has 14 days, from receipt of this Report and Recommendation, in which to file any written objections to this Recommendation with the District Court. Any party opposing said objections shall have 14 days, from receipt of any objections filed in this Report, in which to file any responses to said objections. Failure to file specific objections within 14 days of receipt of this Report and Recommendation can constitute a waiver of further appeal of this Recommendation. *Thomas v. Arn*, 474 U.S. 140 106 S. Ct. 466, 88 L.Ed.2d 435 (1985), *Reh'g denied*, 474 U.S. 1111 (1986).

ENTERED this 8th day of February, 2011.

/s/ Joe B. Brown
JOE B. BROWN
United States Magistrate Judge

¹Of course, it may be that in the interim the statute of limitations has run and the case cannot be refiled. However, that issue is not before the Court at this time.